No. 14-17-00685-CR

In the
Court of Appeals for the
Fourteenth District of Texas
At Houston

No. 1555099
In the 228th District Court of Harris County, Texas

NELSON GARCIA DIAZ
Appellant
V.
THE STATE OF TEXAS
Appellee

STATE'S APPELLATE BRIEF

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ORAL ARGUMENT REQUESTED ONLY IF GRANTED TO APPELLANT

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to TEX. R. APP. P. 39, the State requests oral argument only if oral argument is granted to the appellant.

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Trial Judge:

Hon. Belinda Hill — Presiding Judge

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STATEMENT OF THE CASE

The appellant was charged with the burglary of Troy Dupuy's habitation committed on September 26, 2013 (CR – 6). He pled "not guilty" to the charge, and the case was tried to a jury (CR – 142). The jury found him guilty and sentenced him to thirty-two years in prison on August 14, 2017 (CR – 142). The appellant filed notice of appeal that same day, and the trial court certified that he had the right to appeal (CR – 145, 147).

STATEMENT OF FACTS

Javier "Gordo" Gomez had been a drug trafficker in the 1990s; but the authorities started following him at the end of that decade, so he became a confidential informant instead (RR. VII – 77, 80-81). He sold vegetables at a flea market and worked as a paid informant for the Drug Enforcement Administration (DEA) (RR. VII – 76). His friend Chipo introduced him to the appellant as "Jesse," and the two met each other about three or four times (RR. VII – 79-80). The appellant had a badge that identified him as "Jesse Santine Corbani." (RR. X – 228-229) (St. Ex. 204). He lived in an apartment behind the Fiesta near Gessner and Braeswood (RR. VII – 82).

Troy Dupuy was a 25-year veteran of the Houston Police Department and a member of its SWAT team (RR. VI – 23, 47). He lived in Cypress with his wife and 14-year-old son (RR. VI – 24-25, 28). At around 10:00 p.m. on September 26, 2013, the couple was home in bed when two men burglarized the house (RR. VI – 29-32, 34-42, 89).

Dupuy heard a banging, so he grabbed his Smith & Wesson 9-millimeter handgun from the dresser drawer and headed toward the kitchen (RR. VI – 35, 90, 146) (RR. VIII – 281). He was looking outside of the house through the windows when he heard a few low voices on the front porch (RR. VI – 40-41). There was a loud bang on the front door, and it flew open (RR. VI – 42, 45, 92). One of the men on the front porch yelled, "Police! Police! Police!" (RR. VI – 46, 92). Dupuy did not think that it sounded like a real police raid, but he did not start shooting because he was not positive (RR. VI – 47).

Less than two seconds later, someone came through the door (RR. VI – 48-49). Dupuy turned on the light and saw two Hispanic men (RR. VI – 51). One had a gun in his right hand, light colored clothing, a backpack on his back, and sunglasses on top of his head (RR. VI – 51). The other man was standing in the doorway, but Dupuy did not have much time to observe him because that man immediately ran (RR. VI – 53-54). Dupuy fired two shots while the guy with the backpack hit the floor and rolled behind a pillar (RR. VI – 54).

Dupuy heard a scream and thought that he had hit one of the men (RR. VI – 55). He stood up but immediately heard two gunshots from the guy behind the pillar (RR. VI – 57, 92). One of the bullets entered Dupuy's thigh; he staggered backward and was bleeding badly (RR. VI – 58-59). Nevertheless, he tried to hold his position and prevent anyone from entering the house further to where his wife was located (RR. VI – 59). Apparently, the intruder took that opportunity to flee from the house because Dupuy heard tires squealing outside (RR. VI – 59-60). Dupuy returned to the bedroom to look for a tourniquet while his wife talked to 911 (RR. VI – 60, 75, 92-93). An ambulance took him to Memorial Hermann Hospital (RR. VI – 65).

David Angstadt with the Harris County Sheriff Office's (HCSO) homicide unit was called to the scene (RR. VII – 133). He saw obvious signs of a shootout (RR. VII – 136). There was damage to Dupuy's front door consistent with it being kicked in (RR. VI – 113-115) (RR. VII – 141) (St. Ex. 12). Blood was on the floor (RR. VI – 116-120). The robber had left his sunglasses, the back of a cell phone, and the phone's battery at the scene (RR. VI – 73-74, 96-98, 134-136, 158-159) (RR. VII – 141) (St. Ex. 10, 21, 28-29). There were 9-millimeter and .380 caliber shell casings in the house (RR. VI – 146-147) (RR. VII – 141). But no .380 caliber firearm was found at the scene (RR. VI – 179). Officers spoke with the neighbors and got a general description of the vehicle (RR. VI – 220) (RR. VII – 142).

Shortly thereafter, Gomez was at the appellant's apartment when the appellant said that some friends had sent him to a house but that he had made a mistake and went to the wrong house (RR. VII – 82, 125). The appellant said that he went there to rob and look for drugs (RR. VII – 83). But when the appellant went inside, "a white man was inside and there was a shootout." (RR. VII – 83). He said that the man shot at him and he fired back (RR. VII – 84). He said that parts of his cell phone were left at the scene (RR. VII – 84).

On September 30, Gomez provided that information along with the appellant's phone numbers to DEA Special Agent Ray Thompson (RR. VI – 235, 238) (RR. VII – 54, 75, 92). Thompson was able to associate two names with those numbers: "Nelson Garcia Diaz" and "Jesse." (RR. VI – 238-239) (RR. VIII – 46). Thompson passed that information along to Detective Angstadt (RR. VI – 237) (RR. VII – 18-19, 57). Angstadt created a photo lineup that included a picture of the appellant, but Dupuy was unable to identify anyone (RR. VI – 76) (RR. VII – 151-155).

On October 1, the appellant was arrested by the Gulf Coast Task Force in the Fiesta parking lot near his apartment (RR. VII – 155-159) (RR. VIII – 137-140, 159-166). He was sitting in the rear passenger seat of a vehicle and fumbling around inside the back seat pocket (RR. VIII – 166). Inside that pocket was a badge on a neck chain and a black .40 caliber Glock 22 pistol (RR. VIII – 107,

167, 176-181, 293) (St. Ex. 142). Also inside the vehicle were gloves and a screwdriver (RR. VIII – 198).

Before deciding that he did not want to continue the interview, the appellant told Angstadt that he was from Puerto Rico, had lived in Atlanta, and currently stayed on Braeswood (RR. VIII – 113-114). Angstadt spoke with the three other men in the car and came to the conclusion that the appellant had committed another robbery (RR. VIII – 115-116, 126-128). DNA was taken from all of the people in the car (RR. VIII – 43-45, 48-49, 111, 165, 244) (St. Ex. 98).

The appellant had three cell phones on his body; two more were inside the vehicle; Angstadt obtained search warrants for all of them (RR. VII – 172-174) (CR – 60-71) (Def. Ex. 2, 3). On one of the cell phones was a picture of the appellant, wearing sunglasses and posing with the badge (RR. X – 177) (St. Ex. 204). On another phone, were pictures of the appellant wearing sunglasses and posing with a handgun (RR. X – 193-194) (St. Ex. 205). One of the phones was used to access a KHOU story on September 28, 2013 regarding a fake cop shooting an HPD officer in his Harris County home (St. Ex. 204). Another showed calls and texts to and from Gordo (St. Ex. 203).

Occupants of the appellant's apartment gave the police consent to search (RR. VIII – 142-143) (RR. X – 182). The police found a small Kelty backpack inside, which contained pepper spray, a leather holster, large white plastic zip ties,

a Glock pistol box, a seven-point bounty hunter badge on a lanyard, and some .40 caliber bullets (RR. VIII – 221-223, 227, 231, 238) (St. Ex. 117-121, 130). On the table was a cell phone that was missing both its battery and battery cover (St. Ex. 122-124). In a nearby box was a clip of .380 caliber bullets (RR. VIII – 235-236) (St. Ex. 125-126). They were made by the same manufacturer as the .380 shell casings found at the scene of the Dupuy shooting (RR. VIII – 305). The appellant could not be excluded as a contributor of DNA on the sunglasses, the Glock, the zip ties, the gloves, and the magazine loader (RR. X – 80, 121).

REPLY TO APPELLANT'S SOLE POINT OF ERROR

In his sole point of error, the appellant complains that the trial court erred in denying his motion to suppress evidence obtained from three cell phones. (App'nt Brf. 12-37). This claim lacks merit because the evidence was properly obtained from the appellant's cell phones after a judge signed search warrants based on probable cause. Furthermore, the appellant was not harmed by the admission of any evidence seized from his cell phones based on the mountain of other circumstantial evidence and credible testimony presented to the jury.

The appellant filed a pre-trial motion to suppress, which requested that the court exclude all evidence seized from his cell phones because there were no anonymous tipsters as mentioned in the affidavit, there was no specific link

between the phones and the offense, the warrants allowed a general search, and they failed to identify two of the owners of the cell phones (CR – 53-58). The trial court held a hearing on the motion to suppress, during which four witnesses testified: DEA Special Agent Thompson, DEA Special Agent Robert Layne, Detective Angstadt, and district attorney investigator Tuan Pham (Supp. RR. II – 8-10, 16, 36, 63) (RR. III – 3). The court also considered two search warrant affidavits and their related warrants to search five cell phones and one computer (Supp. RR. II – 10) (Def. Ex. 2,3).

The first paragraph of the search warrant affidavits was an accurate summary of Dupuy's version of the offense, but did not necessarily reveal the relevance of the cell phones (Def. Ex. 2, 3). The second paragraph summarized the physical evidence at the scene, including the cell phone battery and battery cover that were left at Dupuy's house (Def. Ex. 2, 3). And the third paragraph described Gomez's tip that led to the appellant (Def. Ex. 2, 3). The fourth and fifth paragraphs described the appellant's arrest, which included the discovery of three cell phones on his person and two more within his reach, as well as the consent to search the appellant's apartment, which included the discovery of a laptop computer (Def. Ex. 2, 3). The sixth paragraph showed that the appellant's DNA could not be excluded from the sunglasses left at the scene of the crime as well as the appellant's firearm, zip ties, gloves, and magazine loader (Def. Ex. 2).

The last long paragraph of the search warrant affidavits noted that the appellant had been indicted for three offenses arising out of Dupuy's home invasion: felon in possession of a weapon, aggravated robbery, and burglary of a habitation (Def. Ex. 2, 3). It then established the relevance of the cell phone contents through Angstadt's experience and training that "the majority of persons, especially those using cellular telephones, utilize electronic and wire communications almost daily," and that "stored communication probably exists within the seized cellular phones and computer and the contents of these communications are probably relevant and material to the offenses committed." (Def. Ex. 2, 3). Angstadt also swore that "individuals engaged in criminal activities utilize cellular telephones and other communication devices to communicate and share information regarding crimes they commit," and that based on his investigation, the appellant "may have communicated with other individuals before, during, or after the commission of these offenses using his cellular phone or computer." (Def. Ex. 2, 3).

The appellant took issue with the following paragraph from the search warrant affidavits because it characterized Gomez as an anonymous tipster rather than a confidential informant:

> On September 30, 2013, Dep. D.A. Angstadt received an anonymous tip that an individual known as "Jessie" was involved in the home invasion against the Complainant. The tipster provided two phone numbers for the suspect. Based on Dep. D.A. Angstadt's

> training and experience as a narcotic, robbery, and homicide investigator, Dep. D.A. Angstadt knew persons who commit home invasions are commonly involved in the illegal narcotics trade. Dep. D.A. Angstadt spoke to DEA Special Agent Michael Layne and requested SA Layne run the phone numbers through DEA databases. Dep. D.A. Angstadt learned that one of the phone numbers belonged to Defendant Nelson Garcia Diaz. Dep. D.A. Angstadt learned that Defendant had active warrants for Armed Robbery and Kidnapping from Georgia. Dep. D.A. Angstadt also learned that the Defendant was a convicted felon. Dep. D.A. Angstadt notified the Gulf Coast Violent Offender Task Force that Defendant was wanted and a suspect in the present case.

(CR – 61) (RR. III – 33-44). The prosecutor pointed out that Angstadt did not know the identity of the informant, so Gomez was anonymous to him, and every other assertion in that paragraph was uncontroverted (RR. III – 48-50).

The trial court denied the motion to suppress (RR. IV – 27). It found that Pham, Layne, and Thompson all testified credibly at the hearing (Supp. CR – 17, 23). It also found that Angstadt was a credible witness except when he testified that he did not recall if he received the anonymous tip before his telephone conversation with Layne, that he did not know about a DEA confidential informant, and that the informant was an anonymous tipster (Supp. CR – 17, 22). Nevertheless, the DEA confidential informant reported his information as an anonymous tipster, and was the anonymous tipster in the search warrant affidavit because Angstadt did not know his identity (Supp. CR – 21, 22-23). The information provided by the tipster was confirmed and found to be true by Layne

and Thompson (Supp. CR – 21). The DNA information in the search warrant affidavit was legally obtained through a search warrant (Supp. CR – 25).

The trial court found that Angstadt made an incomplete and not completely accurate statement by characterizing the DEA confidential informant as an anonymous tipster (Supp. CR – 26). Nevertheless, "the manner in which an officer receives information from a confidential informant is not material as it pertains to probable cause." (Supp. CR – 26). Moreover, even if those statements were removed from the search warrant affidavits, it would still support probable cause to search the cell phones (Supp. CR – 27). The warrants did not allow a general search but rather listed specific targets of the search (Supp. CR – 28). Therefore, the search of the phones did not violate the appellant's rights (Supp. CR – 29).

The trial court's ruling on the admissibility of evidence is subject to an abuse of discretion standard on appeal. *See Coffin v. State*, 885 S.W.2d 140, 149 (Tex. Crim. App. 1994). A reviewing court should not reverse a trial judge whose ruling was within the "zone of reasonable disagreement." *Green v. State*, 934 S.W.2d 92, 101 (Tex. Crim. App. 1996). The reviewing court must view the evidence in the light most favorable to the trial court's ruling, giving the trial court almost total deference on its findings of historical fact that find support in the record. *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997).

A. The evidence was properly obtained from the appellant's cell phones after a judge signed search warrants based on probable cause.

The core of the Fourth Amendment's warrant clause and its Texas equivalent is that a magistrate may not issue a search warrant without first finding "probable cause" that a particular item will be found in a particular location. *State v. Duarte*, 389 S.W.3d 349, 354 (Tex. Crim. App. 2012). The test is whether a reasonable reading by the magistrate would lead to the conclusion that the four corners of the affidavit provide a "substantial basis" for issuing the warrant. *Id*. Probable cause exists when, under the totality of the circumstances, there is a "fair probability" that contraband or evidence of a crime will be found at the specified location. *Id*. This is a flexible, non-demanding standard. *Id*.

After reviewing the supporting affidavit realistically, and with common sense, a reviewing court must uphold the magistrate's decision so long as the magistrate had a substantial basis for concluding that probable cause existed. *Id*. The focus is not on what other facts could or should have been included in the affidavit; the focus is on the combined logical force of facts that are in the affidavit. *Id*., 389 S.W.3d at 354–55. When determining a motion to suppress evidence seized through execution of a search warrant, courts cannot review the substantive issue independently or de novo but must give great deference to the

magistrate's probable cause determination to issue a warrant. *Lane v. State*, 971 S.W.2d 748, 750–51 (Tex. App.—Dallas 1998, pet. ref'd).

Under *Franks v. Delaware*, 438 U.S. 154 (1978), a defendant may challenge the truth of an affidavit used to obtain a search warrant only if he "makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request." *Id.*, 438 U.S. at 155–56; *see also Harris v. State*, 227 S.W.3d 83, 85 (Tex. Crim. App. 2007). "In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit." *Franks*, 438 U.S. at 156.

The Texas Court of Criminal Appeals has not recognized that a *Franks* analysis pertains to omissions as well as false statements. *See Brooks v. State*, 642 S.W.2d 791, 796–97 (Tex. Crim. App. 1982). However, this Court has concluded that allegations of material omissions are to be treated the same as claims of

material misstatements. *See Melton v. State*, 750 S.W.2d 281, 284 (Tex. App.—Houston [14th Dist.] 1988, no pet.).

In cases where the defendant claims the affidavit contains material omissions, the defendant must prove by a preponderance of the evidence: first, that omissions were in fact made; second, that they were made intentionally or with a reckless disregard for the accuracy of the affidavit. *Id.* If a defendant carries this burden, the reviewing court then determines if the affidavit would still establish probable cause for the search if the omitted material were included in the affidavit. *Id.* If not, the court will void the warrant and suppress the evidence seized pursuant to it. *Id.* (citing *United States v. Martin*, 615 F.2d 318, 328 (5th Cir. 1980)).

Even if there were a material omission in the affidavits—specifically, that the anonymous tipster was also a confidential informant—that additional fact would not have eviscerated the probable cause in the affidavits. *See Martin*, 615 F.2d at 328. The affidavits included the facts that:

- Dupuy and his wife were in their bedroom at 10:00 p.m. when they heard a loud bang, so Dupuy took his gun to investigate. He heard two males speaking and saw two Hispanic males kick the door in. They said, "Police, Police."

- Dupuy saw the appellant raise a pistol toward him. The appellant appeared to be young, was clean-shaven with short hair, and had a slim build. There were sunglasses on his head.

- Dupuy was a police officer and determined that the intruders were not police officers, so he began to fire his gun. The second male ran, but the appellant

dropped to the floor and began shooting at Dupuy, striking him in the leg. The appellant then ran from the house.

- Bullet holes, shell casings, blood, and projectiles at the scene corroborated Dupuy's description of the events. Sunglasses, a cell phone battery, and a cell phone battery cover were left behind at the house.

- A tip [from an anonymous or confidential informant] came in that "Jessie" was involved in the home invasion. The two phone numbers provided led to the appellant.

- The appellant was arrested in a vehicle that contained a .40 caliber Glock 22 pistol in a pocket directly in front of where the appellant was seated in the vehicle, two cell phones within his reach, and three more cell phones on his body.

- The appellant could not be excluded as a possible source of the DNA on the sunglasses that were left at the scene of the shooting.

- Based on Dupuy's home invasion, the appellant was indicted for being a felon in possession of a weapon, aggravated robbery, and burglary of a habitation.

- The majority of persons, especially those using cellular telephones, use electronic and wire communications almost daily.

- People engaged in criminal activities use cellular telephones and other communication devices to communicate and share information regarding crimes they commit.

- The appellant may have communicated with other people before, during, or after the commission of these offenses using his cellular phone.

(Def. Ex. 2, 3). Thus, even when the anonymous tipster is also described as a confidential informant, the affidavits still contained probable cause to believe that the cell phones found along with the appellant would contain evidence of the crimes for which he had been indicted. The trial court did not abuse its discretion

in overruling the appellant's motion to suppress, and his conviction should be affirmed.

The appellant claims that the warrants in the present case were evidentiary search warrants issued under Article 18.02(a)(10), which require probable cause that "the specifically described property or items that are to be searched for or seized constitute evidence of that offense or evidence that a particular person committed that offense." (App'nt Brf. 21) (citing TEX. CRIM. PROC. CODE § 18.01(c)).

But these were not evidentiary search warrants under Article 18.02(a)(10). They were warrants issued under Article 18.0215, which provides that

> (c) A judge may issue a warrant under this article only on the application of a peace officer. An application must be written and signed and sworn to or affirmed before the judge. The application must:
>
> (1) state the name, department, agency, and address of the applicant;
>
> (2) identify the cellular telephone or other wireless communications device to be searched;
>
> (3) state the name of the owner or possessor of the telephone or device to be searched;
>
> (4) state the judicial district in which: (A) the law enforcement agency that employs the peace officer is located, if the telephone or device is in the officer's possession; or (B) the telephone or device is likely to be located; and

> (5) state the facts and circumstances that provide the applicant with probable cause to believe that: (A) criminal activity has been, is, or will be committed; and (B) searching the telephone or device is *likely to produce evidence* in the investigation of the criminal activity described in Paragraph (A).

TEX. CRIM. PROC. CODE § 18.0215(c) (emphasis added). The affidavits in the present case met those requirements (Def. Ex. 2,3). Therefore, the warrants were properly issued under Article 18.0215.

The affidavits supporting these search warrants had to state the facts and circumstances that provided probable cause to believe that searching the cell phones was likely to produce evidence in the investigation of the criminal activity. TEX. CRIM. PROC. CODE § 18.0215(c)(5). But they were not required to establish probable cause that the cell phones constituted evidence of that offense or evidence that a particular person committed that offense. *Compare* TEX. CRIM. PROC. CODE § 18.01(c) *with* TEX. CRIM. PROC. CODE § 18.0215(c).

Furthermore, the same factors used by the Supreme Court to require a warrant in the search of cell phones also establish that such searches are likely to produce evidence in the investigation of the criminal activity committed by their possessors. *See Riley v. California*, 573 U.S. 373, 395 (2014) ("it is no exaggeration to say that many of the more than 90% of American adults who own a cell phone keep on their person a digital record of nearly every aspect of their lives—from the mundane to the intimate."). In other words, if a person is a career

criminal, then there is likely evidence of that aspect of their lives on their cell phone.

In the present case, the appellant was an indicted criminal with several pending felonies (Def. Ex. 2, 3). He had an extensive criminal history and was arrested in the possession of other instruments of his crimes (Def. Ex. 2,3). Even the Supreme Court would acknowledge that the five cell phones found in his possession would likely produce evidence in the investigation of that criminal activity. Therefore, the trial court did not abuse its discretion by denying the motion to suppress. And the appellant's sole point of error should be overruled.

B. The appellant was not harmed by the information on his cell phones compared to the mountain of other circumstantial evidence and credible testimony presented to the jury.

Even if this Court believes that the information obtained from the appellant's cell phones should have been suppressed, this Court should still affirm the conviction if it determines "beyond a reasonable doubt that the error did not contribute to the conviction or punishment." TEX. R. APP. P. 44.2(a); *see Wall v. State*, 184 S.W.3d 730, 746 (Tex. Crim. App. 2006). Under Rule 44.2(a), this Court must "calculate, as nearly as possible, the probable impact of the error on the jury in light of the other evidence." *McCarthy v. State*, 65 S.W.3d 47, 55 (Tex. Crim. App. 2001); *Wesbrook v. State*, 29 S.W.3d 103, 119 (Tex. Crim. App. 2000).

If there is a reasonable likelihood that the error materially affected the jury's deliberations, then the error is not harmless beyond a reasonable doubt. *Wall*, 184 S.W.3d at 746. A finding of harmless error means that the nature of that evidence is such that it could not have affected the jury's deliberations or verdict. *Id.* The presence of other overwhelming evidence that was properly admitted which supports the material fact to which the inadmissible evidence was directed may be an important factor in the evaluation of harm. *Id.*

In the present case, even when the cell phone information is not considered, the evidence supporting the appellant's guilt was overwhelming. Dupuy testified that a robber entered his house, shot him, and left behind his sunglasses, the back of a cell phone, and the phone's battery (RR. VI – 58-59, 73-74, 96-98, 134-136, 158-159) (RR. VII – 141) (St. Ex. 10, 21, 28-29). The appellant told Gomez that he robbed the wrong house, that there was a shootout, and that he left parts of his cell phone at the scene (RR. VII – 83-84). The appellant could not be excluded as a contributor of DNA on the sunglasses (RR. X – 80, 121). Bullets founds in the appellant's possessions were made by the same manufacturer as the .380 shell casings found at the scene of the Dupuy shooting (RR. VIII – 305) (RR. VI – 146-147) (RR. VII – 141).

The majority of the closing argument of both parties focused on the ballistics and DNA evidence, not the data discovered on the cell phones (RR. XI – 21-74).

The appellant agreed with the State that the only issue was identity; but he spent most of his time criticizing the investigation (RR. XI – 25, 31-49). He repeatedly talked about a cell phone, but it was the untested disassembled cell phone, not the data taken from the searched cell phones (RR. XI – 31-34, 45-46). In fact, the prosecutor noted that the appellant had failed to mention the data on the cell phones (RR. XI – 52-53). Nevertheless, the State's argument was focused on the testimony of the witnesses and the corroboration by the physical evidence (RR. XI – 53-74). When the prosecutor referenced the contents of the phones, it was to corroborate the testimony in the case, not as substantive evidence of the crime (RR. XI – 53-74).

Despite six days of trial, the jury found the appellant guilty in just 27 minutes (CR – 202). Thus, it is unlikely that the cell phone data affected the jury's deliberations because it did not appear that there were any real deliberations. The eyewitness, ballistics, and DNA evidence sealed the appellant's fate, and the data from the cell phones was harmless. Therefore, the appellant's sole point of error should be overruled and his conviction affirmed.

CONCLUSION

It is respectfully submitted that all things are regular and the conviction should be affirmed.

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CERTIFICATE OF SERVICE AND COMPLIANCE

This is to certify that: (a) the word count function of the computer program used to prepare this document reports that there are 5,350 words in it; and (b) a copy of the foregoing instrument will be served by efile.txcourts.gov to:

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